Supreme Court, U.S.
FILED
JAN 24 2001
OFFICE OF THE CLERK

(3)

No. 00-927

# In the Supreme Court of the United States

HENRY L. SOLANO, ACTING SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

BARBARA D. UNDERWOOD
*Acting Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

JUDY E. KRAMER
*Acting Solicitor of Labor*
*Department of Labor*
*Washington, D.C. 20210*

ROSALIND A. KNAPP
*Acting General Counsel*

RADM JAMES S. CARMICHAEL
*Chief Counsel*
*United States Coast Guard*
*Department of Transportation*
*Washington, D.C. 20590*

13pp

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976) | 3 |
| *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974) | 9 |
| *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985) | 2, 3 |
| *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239 (9th Cir. 1998) | 2, 3, 9 |
| *Inspection of Norfolk Dredging Co., In re*, 783 F.2d 1526 (11th Cir.), cert. denied, 479 U.S. 883 (1986) | 2, 3 |
| *Secretary of Labor* v. *Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 1699 (1992) | 3 |
| *Secretary of Labor* v. *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982) | 3 |
| *Secretary of Labor* v. *Tidewater Pac., Inc.*, 17 O.S.H. Cas. (BNA) 1920 (1997), aff'd, 160 F.3d 1239 (9th Cir. 1998) | 3, 9 |
| *Southern Ry.* v. *OSHRC*, 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976) | 3 |
| *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980) | 3 |

| Statutes, regulations and rule: | |
|---|---|
| Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* | 1, 2, 3, 4, 5, 6, 8, 9 |
| § 2(b), 29 U.S.C. 651(b) | 5 |
| § 4(a), 29 U.S.C. 653(a) | 9 |
| § 4(b)(1), 29 U.S.C. 653(b)(1) | 1, 2, 4, 5, 7 |
| 46 U.S.C. 4102 (1994 & Supp. IV 1998) | 6 |
| 46 C.F.R.: | |
| Pt. 4 | 7 |

| Regulations and rule—Continued: | Page |
|---|---|
| Pts. 24-26 (Subch. C) | 6 |
| Section 24.05-1 (Table 24.05-1(A)) | 6 |
| Section 24.10-27 | 6 |
| Sup. Ct. R. 10 | 2 |
| Miscellaneous: | |
| S. Rep. No. 1282, 91st Cong., 2d Sess. (1970) | 5 |


# In the Supreme Court of the United States

No. 00-927

HENRY L. SOLANO, ACTING SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

The Secretary of Labor seeks this Court's review of a decision of the United States Court of Appeals for the Fifth Circuit holding that the Occupational Safety and Health Act (OSH Act) does not apply to the working conditions of seamen aboard uninspected vessels. As we have explained in our petition for a writ of certiorari, that decision squarely conflicts with the holdings of three courts of appeals. Pet. 9-10. More generally, the decision departs from the consensus of other courts of appeals that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), on which the Fifth Circuit relied, does not confer an industry-wide exemption from the Act's coverage based on limited regulation by another agency of employees in a particular industry. Pet. 10-11. We

also explain in the petition that the issue addressed by the court of appeals is an important one. Pet. 19-21.

Respondent acknowledges (Br. in Opp. 14) that there is a conflict among the courts of appeals and does not dispute the importance of the issue. Instead, respondent opposes this Court's review (*id.* at 8-30) only on the ground that respondent considers the decision of the court of appeals to be correct. The merit of the court of appeals' decision, however, does not warrant denial of review when, as respondent acknowledges, the decision has created a circuit conflict on a question of recurring importance. See Sup. Ct. R. 10. Moreover, as we explain in the certiorari petition (at 12-19), and contrary to respondent's contention, the court of appeals' decision is incorrect.

1. As respondent acknowledges (Br. in Opp. 14), the courts of appeals are in conflict on the question presented. The Second, Ninth, and Eleventh Circuits have each upheld regulation by the Occupational Safety and Health Administration (OSHA) of working conditions on uninspected vessels. *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1244-1245 (9th Cir. 1998); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1531 (11th Cir.), cert. denied, 479 U.S. 883 (1986); *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 780 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985). The Fifth Circuit in this case disagreed and held that only the Coast Guard can regulate working conditions of seamen on uninspected vessels. Pet. App. 3a-7a; see also *id.* at 66a-67a (denying petition for rehearing en banc).

In addition, the Fifth Circuit's decision conflicts more generally with decisions of the District of Columbia and Fourth Circuits holding that Section 4(b)(1) does not authorize industry-wide exemptions from OSH Act coverage based on limited regulation by another



agency. *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1053-1054 (D.C. Cir. 1976) (per curiam); *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976); accord *Tidewater Pac.*, 160 F.3d at 1245; *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778.[1]

2. In addition to acknowledging the conflict, respondent does not dispute that the question presented is important. As we describe in our petition (at 19-20), the effect of the decision of the court of appeals is to leave the crews of several thousand uninspected vessels within the Fifth Circuit with no statutory or regulatory protection from serious threats to their occupational safety and health, except for a few Coast Guard rules addressing a few hazards on only some uninspected

---

[1] Respondent suggests (Br. in Opp. 13, 14, 18-19) that the Fourth Circuit and the Occupational Safety and Health Review Commission share the Fifth Circuit's position on OSH Act coverage of uninspected vessels. That is incorrect. The Fourth Circuit decision on which respondent relies, *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980), did not address OSH Act coverage of working conditions of seamen on uninspected vessels, but instead held that a longshoreman could not rely on a Coast Guard regulation to support a negligence action against a shipowner. As for the Commission decision cited by respondent, *Secretary of Labor* v. *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982), subsequent Commission decisions have held that uninspected vessels are covered by the OSH Act and have rejected a reading of *Dillingham* that would endorse an industry-wide exemption from OSH Act coverage. See *Secretary of Labor* v. *Tidewater Pac., Inc.*, 17 O.S.H. Cas. (BNA) 1920, 1923-1924 (1997), aff'd, 160 F.3d 1239 (9th Cir. 1998); *Secretary of Labor* v. *Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1704-1705 (1992). The ALJ relied on those precedents in finding OSH Act coverage in this case, see Pet. App. 13a-17a, and the Commission itself elected not to review the ALJ's decision, thereby rendering it the final decision of the Commission, see *id.* at 20a.

vessels. Indeed, respondent tacitly acknowledges that the issue in this case is important to employers as well as employees, because respondent contends (erroneously) that the rule followed by all the other courts of appeals "[s]ubject[s] employers to double agency jurisdiction" and therefore "involves a waste of the employer's resources." Br. in Opp. 28.

3. a. In our petition (at 12-19), we explain that the Fifth Circuit's decision in this case is incorrect. Contrary to the view of the Fifth Circuit, Section 4(b)(1) does not create industry-wide exemptions from the OSH Act based on limited exercises of regulatory authority by other federal agencies. Rather, the OSH Act is displaced only when another agency actually has regulated the working conditions at issue or has articulated a policy that the working conditions should not be regulated. Because the Coast Guard has neither regulated the working conditions at issue here nor articulated a policy that they should not be regulated, the OSH Act continues to apply.

That understanding of Section 4(b)(1) follows from its text, the history surrounding its enactment, the Secretary of Labor's long-standing interpretation, and the purpose of the OSH Act. Section 4(b)(1) provides that "[n]othing in [the OSH Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). As all the courts of appeals (including the Fifth Circuit) agree, that language expressly provides that OSH Act coverage is displaced only when another agency actually has "exercise[d]" its statutory authority to regulate occupational safety and health by prescribing or enforcing regulations or by articulating a policy that



regulation is not warranted. See Pet. 13 & n.6 (citing cases).

The text of Section 4(b)(1), which limits preemption of OSH Act coverage to "working conditions * * * with respect to which" another agency has exercised such authority, also makes clear that another agency's exercise of its authority to regulate some working conditions of some employees within an industry does not create an industry-wide exemption from OSH Act coverage. See Pet. 14 (citing cases). The drafting history of the provision confirms that this language was used precisely in order to limit the circumstances in which the OSH Act is superseded to "*particular* working conditions regarding which another Federal agency exercises statutory authority." S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis added); see Pet. 15. That understanding is also reflected in long-standing OSHA regulations, a 1980 report by the Secretary of Labor to Congress, and three decades of citations for OSH Act violations. See Pet. 16. Finally, the Secretary's interpretation of Section 4(b)(1) advances the OSH Act's express purpose "to assure so far as possible *every* working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b) (emphasis added).

We further explain in the certiorari petition that, if the court of appeals had applied the proper interpretation of Section 4(b)(1) in this case, the court would have concluded that Coast Guard action has not displaced the OSH Act. See Pet. 17-18. Although the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard inspected vessels, the vessel at issue in this case, the Mr. Beldon, is an uninspected vessel. See *ibid.*; Pet. 4, 12 & n.5. The Coast Guard has regulated

only a few working conditions on uninspected vessels. See 46 C.F.R. Pts. 24-26 (implementing 46 U.S.C. 4102 (1994 & Supp. IV 1998)). The working conditions at issue in this case are the hazards posed by oil drilling operations on uninspected vessels. The Coast Guard has not regulated those working conditions. It therefore has not exercised any authority that displaces OSH Act coverage of those conditions.

b. Respondent begins its defense of the Fifth Circuit's decision by arguing (Br. in Opp. 8-13) that its holding is dictated by Fifth Circuit precedent. That contention is, however, irrelevant to whether the decision is correct. Respondent therefore attempts to bolster its defense by asserting (*id.* at 6-7, 15-21) that the distinction between inspected and uninspected vessels is of no import because "the Coast Guard's regulations over uninspected vessels is [*sic*] pervasive and unencumbered" (*id.* at 6). As we have explained, however, that assertion is incorrect. Coast Guard regulations directed at uninspected vessels cover only a limited range of health and safety hazards on only certain uninspected vessels. See Pet. 4; 46 C.F.R. Pts. 24-26 (Subch. C). Those regulations do not address the particular working conditions faced by employees engaged in oil drilling operations, and they do not even apply to the Mr. Beldon, which is an uninspected barge that does not carry passengers for hire. See 46 C.F.R. 24.10-27; *id.* § 24.05-1 (Table 24.05-1(A) (Col. 6)).[2]

[2] Respondent asserts (Br. in Opp. 3) that its expert witness "confirmed that the MR. BELDON's living quarters met or exceeded Coast Guard requirements for structural fire protection, habitability, machinery spaces, electrical distribution system, fire prevention, life saving, communication, abandon ship, training and safety programs." That assertion is both unsupported by the record and irrelevant. First, respondent's witness testified only that the living quarters on a "sister vessel" (ALJ Tr. 130, 142) met Coast Guard regulations for "inspected vessels" (*id.* at 143). Second, and more fundamentally, those regulations do not apply to the Mr. Beldon. Respondent's further assertions (Br. in Opp. 29) that the Coast Guard "absolved Mallard of any wrongdoing" in this case and "decided that no regulation is needed" of the hazards that led to the deaths of respondent's employee's are also incorrect. The Coast Guard report identified several shortcomings in respondent's safety procedures, Pet. App. 48a-50a, and referred the matter to OSHA because the Coast Guard lacked applicable regulations, *id.* at 12a, 24a-25a.



Notably, respondent does not identify a single Coast Guard regulation that addresses the safety hazards posed by oil drilling operations on uninspected vessels. The reason for that omission is simple: no such regulation exists.[3]

Respondent also argues (Br. in Opp. 21-26, 27-30) that the Secretary's interpretation of Section 4(b)(1) is incorrect. That argument, however, is based on a misreading of the Secretary's interpretation. Contrary to respondent's characterization (*id.* at 21), the Secre-

[3] Respondent asserts (Br. in Opp. 17) that "numerous other Coast Guard regulations outside the chapter entitled 'Uninspected Vessels' govern the working conditions of seamen aboard uninspected vessels." The only regulations that respondent identifies, however, are those concerning reporting and investigation of marine casualties (46 C.F.R. Pt. 4), which, as we note in our petition (at 5 n.1), apply to both inspected and uninspected vessels. Even though marine casualties may, in some instances, result from unsafe working conditions, regulations that govern reporting and investigation of casualties that have already occurred do not regulate those working conditions themselves. Although uninspected vessels may become subject to certain additional Coast Guard regulations because of the particular activities in which they engage at a particular time, the Coast Guard has no ongoing, substantial regulations of the working conditions of employees on uninspected vessels other than those specified in the subchapter governing those vessels.

tary does not take the position that "OSHA regulations are preempted under Section 4(b)(1) only if the Coast Guard has a specific regulation which is nearly identical to the OSHA regulation." Rather, as we have explained, the Secretary's position, which is shared by the Coast Guard and the rest of the United States government, is that "the proper inquiry under Section 4(b)(1) is whether the Coast Guard has regulated the particular working conditions with respect to which OSHA seeks to enforce its own safety and health standards or has articulated a policy that the working conditions not be regulated." Pet. 17. Also contrary to respondent's contentions (Br. in Opp. 21, 22, 25), the government's approach is not a "nook and cranny" theory. Displacement of OSHA regulation can occur with regard to either a specific working condition or a set of working conditions with respect to which an agency has comprehensive statutory authority and has indicated that its exercise of that authority is sufficient. See Pet. 12 n.5. Indeed, that is precisely why OSHA and the Coast Guard agree that Coast Guard regulation *has* displaced OSH Act coverage of the working conditions of seamen on *inspected* vessels. See *ibid.* (citing Memorandum of Understanding *reprinted in* Pet. App. 62a-65a). But OSHA and the Coast Guard also agree that the Coast Guard's limited regulation of some working conditions on some uninspected vessels has not displaced OSH Act coverage of all working conditions on all of those vessels.

Finally, respondent errs in contending (Br. in Opp. 22-25) that the Secretary's interpretation is based on a misreading of the phrase "working conditions of employees." Contrary to respondent's contention, "working conditions" means particular hazards encountered by an employee in the course of his or her job



activities. See Pet. 18 n.8; see also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974) (technical meaning of "working conditions" in the language of industrial relations is a worker's "surroundings"—"the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency"—and "hazards"—"physical hazards regularly encountered, their frequency, and the severity of injury they can cause"). As we have acknowledged, not all the courts of appeals accept that definition of "working conditions," Pet. 18 n.8 (citing cases), but it is the Secretary's long-standing interpretation. In any event, as we explain in the certiorari petition (at 18 n.8), even under the "environmental definition [of working conditions espoused by respondent], it is apparent that the Coast Guard regulation of uninspected vessels is not so pervasive as to preempt [OSHA] jurisdiction as to any particular portion of such vessels nor as to such vessels in whole." *Tidewater Pac.*, 160 F.3d at 1245-1246.[4]

* * * * *

[4] Respondent also argues (Br. in Opp. 7, 27) that the Mr. Beldon is not subject to the OSH Act because a vessel "operating in state territorial waters" is not a "workplace in a State" under 29 U.S.C. 653(a). That argument was not addressed by the court of appeals, Pet. App. 7a, and is, in any event, without merit. See *Tidewater Pac.*, 17 O.S.H. Cas. (BNA) at 1923 (OSH Act applies to territorial waters within a State); Pet. App. 13a (ALJ decision, following *Tidewater Pac.*).

For the foregoing reasons, and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
*Acting Solicitor General*

JUDY E. KRAMER
*Acting Solicitor of Labor*
*Department of Labor*

ROSALIND A. KNAPP
*Acting General Counsel*

RADM JAMES S. CARMICHAEL
*Chief Counsel*
*United States Coast Guard*
*Department of Transportation*

JANUARY 2001